Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY — PETITIONERS

v. No. 03-160

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER, — RESPONDENT

RESPONDENT'S OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF AMERICAN HEALTH CARE ASSOCIATION, AMERICAN ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

Lon C. Sauer, individually, and as administrator of the Estate of Margaretha Sauer (the "Sauer Estate"), opposes the motion for leave to file brief of amicus curiae American Health Care Association, American Association of Homes and Services for the Aging, and National Association of Independent Insurers (the "Industry Groups") for the reasons stated hereinafter.

Rule 37.1 of the Rules of this Court provides that an amicus curiae brief that brings attention of the Court to a relevant matter not already brought to its attention by the parties may be of considerable help to the Court, but an amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored. For the reasons explained hereinafter, the proposed amicus brief of the Industry Groups does not serve the purpose of an amicus brief, and its filing should not be accepted.

The present issue is whether to issue a writ of certiorari to the Supreme Court of Arkansas to review that court's application of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). The proposed amicus brief does not address any of the reasons that this Court considers in granting or denying

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certiorari. The proposed amicus brief does not address any legal issue. It does not point to any important federal question that this Court should resolve. The proposed amicus brief does not point to any conflict between the decision of the Supreme Court of Arkansas in this case and the decision of another state court of last resort or of a United States Court of Appeals. The proposed amicus brief does not claim that the Supreme Court of Arkansas has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Instead, the proposed amicus brief is devoted entirely to judicial lobbying of the sort described in Andrew P. Morriss, *Private Amici Curiae and the Supreme Court's 1997-1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823 (1999). The proposed amicus brief lobbies the Court "by marshaling policy arguments and factual claims not supported by the record." *Id.* at 829. The non-record "facts" described in the proposed amicus brief consist primarily of references to newspapers and to the Industry Groups' own studies posted at their own websites. Of the 31 authorities cited in the proposed amicus brief, 15 are articles from newspapers or magazines, 9 are references to industry sources, 5 are references to government websites (including 3 demographic studies), and 2 are references to law journals. It does not appear that any of the authorities is a publication in a peer review journal.

Professors Rustad and Koenig have described this kind of amicus brief:

> The most common method of introducing social science evidence to the Court is through "non-record evidence" in amicus curiae briefs. At trial, when statistical and social science evidence is employed, "it will be the subject of expert testimony and knowledgeable cross-examination from both sides." Amicus briefs are not subject to the same standards. The poorly controlled use of social science data by amici curiae may not only be prejudicial to the parties, but inimical to sound judicial decision-making.

Michael Rustad and Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (Nov. 1993) (footnotes omitted). The proposed amicus brief of the Industry Groups does not rise even to the level of the "junk social science" described by Professors Rustad and Koenig. It is not social science at all. Not a single article from a recognized social science journal is cited anywhere in the proposed amicus brief. The import of the proposed amicus brief supposedly is to show that a crisis exists for nursing homes and for insurers due to the impact of large punitive damage awards, but the proposed amicus brief does not cite a single study having to do with punitive damage awards. It cites studies relating to the number of lawsuits and the size of claims made in those lawsuits, but it does not cite any study pertaining to punitive damage awards paid by nursing homes or their insurers. Anecdotal references are made to a handful of newspaper articles reporting on jury verdicts awarding punitive damages, but it is impossible to tell from the amicus brief whether the verdicts withstood post-trial motions or appeals, or what happened to them.

Presumably, the intent is to leave the reader with the *feeling* that something amiss has happened in the country; but the proposed amicus brief provides no rational basis for concluding that, indeed, the judicial system is not functioning properly around the country in regard to nursing home litigation, nor that nursing homes and their insurers face a crisis due to punitive damage awards. The amicus brief is an appeal to sympathy and prejudice, not to evidence and logic, and certainly not to law.

Such an appeal may be appropriate in the political process, but it is wholly out of place in court. The proposed amicus brief is but another example of groups who "believe that their appropriate role involves lobbying the Court based on undocumented interest group assertions

and poor quality social science evidence." Morriss, 7 WM. & MARY BILL RTS. J. at 908. As Professor Morriss notes, the "rise of the amici reflects the overall decline in legal argument." *Id.* at 910.

"The judiciary is subject to a determined campaign by lobbyists to convince them that tort reform of punitive damages is vital." Rustad and Koenig, 72 N.C. L. REV. at 141. Yet, the truth is that every imperical study of the punitive damages question has reached conclusions that fail to support the claim that punitive damages have grown dramatically in both frequency and size. *Id.* at 130.

With all due respect, it is beneath the dignity of this Court to permit lobbying efforts of the sort that is proposed by the Industry Groups. We do not suggest that lobbying, itself, is improper. We do say, however, that lobbying should be addressed to the legislative and executive branches, not to the judicial branch.

CONCLUSION

For these reasons, the Sauer Estate respectfully requests that the Motion for Leave to File Brief of Amicus Curiae American Health Care Association, American Association of Homes and Services for the Aging, and National Association of Independent Insurers be denied.

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